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# Musings on BAPCPA and the Individual Chapter 11 Debtor

by

Anne Lawton\*

## INTRODUCTION

In this paper, I present findings from 370 individual cases drawn from 2 samples of chapter 11 debtors who filed for relief in calendar years 2004 or 2007.<sup>1</sup> The purpose of this study is largely descriptive, but I hope to provide data that will guide analysis of the impact, if any, of BAPCPA's changes on individual filing patterns in chapter 11. In an earlier study of the same group of debtors, I found that individual debtors do not fare well in chapter 11, if plan confirmation and successful plan performance are the measures of success.<sup>2</sup> In this follow-up study, I provide data on: (1) the incidence of involuntary chapter 11 filings in individual cases; (2) the percentage of debtors whose cases begin in chapter 7, 12, or 13 prior to conversion to chapter 11; (3) the impact of making small business status mandatory on the percentage of small business debtors post-BAPCPA; and (4) the times to first-plan filing, plan confirmation, conversion and dismissal pre- and post-BAPCPA.

Part A of the Article provides data on the number of individual chapter 11 cases begun by the filing of an involuntary petition. In the aftermath of BAPCPA's enactment, numerous commentators expressed concern that the changes to chapter 11 affecting individual debtors created a possible Thirteenth Amendment problem.<sup>3</sup> Yet, the data show that involuntary filings against individual debtors are extremely rare—only 1 involuntary chapter 11

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<sup>1</sup>I describe the data collection and coding process in Anne Lawton, *The Individual Chapter 11 Debtor Pre- and Post-BAPCPA*, 89 AMERICAN BANKRUPTCY LAW JOURNAL 455, 457-62 (2015) [hereinafter *Individual Debtors*].

<sup>2</sup>See generally *id.*

<sup>3</sup>Robert J. Keach, *Dean Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 502 (2005); see also The Hon. Samuel L. Buford and Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L. J. 1, 34 (stating that Congress had "changed chapter 11 to impose precisely the requirement that an individual debtor 'toil for the benefit of creditors in violation of the Thirteenth Amendment's involuntary servitude prohibition'"); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 583-90 (2005) (discussing the Thirteenth Amendment peonage issue raised by BAPCPA's amendments to chapter 11); Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191 (2009).

filing among the 188 individual debtors in the 2007 sample. Thus, even though the 2005 amendments to the Code create the theoretical possibility of a Thirteenth Amendment issue, as a practical matter the prospect of involuntary servitude is not an issue for individual chapter 11 debtors.

In Part B, I present data on the small but not insignificant group of individual debtors—14% to 16%—who initially filed for relief under chapter 7, 12, or 13 of the Code and then converted to chapter 11. The vast majority of these debtors began their bankruptcy lives in chapter 13, even though their liabilities exceeded one or both of the Code's debt limits for chapter 13. As a result, these debtors wasted time and money—time in a chapter for which they were unqualified, and money paying not only a chapter 11 attorney but also their chapter 13 lawyer. In addition, because most of these debtors did not file an amended petition upon conversion to chapter 11, they did not designate their status as a small versus non-small business debtor, thereby escaping, where applicable, the Code's disclosure and filing deadlines for small business debtors.

In Part C of the Article, I compare the proportion of debtors identifying as small businesses pre- and post-BAPCPA. BAPCPA made small business status mandatory, yet the data from 2007 suggest that debtors who qualify as small businesses are not checking the small business debtor box on the voluntary petition. With the small business reforms, Congress sought to identify early in the case those debtors unable to reorganize. That goal of early identification is undermined, however, if small business debtors can avoid complying with the Code's small business provisions by simply not checking the small business debtor box on the voluntary petition.

In Part D, I provide data to evaluate BAPCPA's small business time frames—the 300-day plan-proposal and the 45-day plan-confirmation requirements. The data are baffling. While there was a sharp decrease in the time to plan confirmation from 2004 to 2007, the time to disposition, i.e., conversion or dismissal, for cases without a confirmed plan increased from 2004 to 2007. The time to first-plan proposal also increased in 2007, even though BAPCPA created a 300-day deadline for plan proposal for small business debtors. Thus, the data are a mixed bag.

I conclude by raising several questions requiring further investigation. It is difficult to draw firm conclusions, at this juncture, about BAPCPA's impact. Some things are clear: involuntary chapter 11 filings are not an issue for individual debtors and the time to plan confirmation dropped dramatically from 2004 to 2007. But, the rate of plan failure also increased significantly from 2004 to 2007. As I discuss in an earlier Article, the Great Recession may account for this upswing in plan failure. But, plan proposal and confirmation take time. Thus, the question remains whether decreasing the time to plan confirmation also increases the risk of plan failure.

## A. INVOLUNTARY FILINGS

The Bankruptcy Code does not authorize an involuntary chapter 13 filing,<sup>4</sup> because of Thirteenth Amendment concerns raised during the drafting of the 1978 Code.<sup>5</sup> In chapter 13, the debtor's post-petition wages become part of the bankruptcy estate.<sup>6</sup> Thus, if the Code allowed creditors to file an involuntary chapter 13 petition against the debtor, those "creditors [would] be able to reach [the] debtor's future income without the debtor's consent. The combination of these two features—an involuntary filing, coupled with a chapter under which future income is devoted to repayment—presents the possible constitutional difficulty."<sup>7</sup>

With BAPCPA, Congress added to the Code both § 1115, which now defines estate property in a chapter 11 case so as to include the debtor's post-petition earnings, and § 1129(a)(15), which supposedly tracks chapter 13's disposable income requirement for plan confirmation.<sup>8</sup> The Code, however, allows creditors to initiate an involuntary bankruptcy proceeding against a chapter 11 debtor.<sup>9</sup> The problem is that the individual debtor thrown into chapter 11 by an involuntary filing has no right to convert his case to chapter 7<sup>10</sup> and must establish cause to obtain dismissal of the bankruptcy case.<sup>11</sup> As numerous commentators pointed out in the aftermath of BAPCPA's enactment, "BAPCPA's amendments relating to individual chapter 11 cases, by paralleling chapter 13 but not prohibiting involuntary cases or forced conversions, and by not providing the option of escape through dismissal or conversion, [ ] raise genuine Thirteenth Amendment concerns."<sup>12</sup>

The data, however, show that post-BAPCPA involuntary chapter 11

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<sup>4</sup>See 11 U.S.C. § 303(a) (stating that "[a]n involuntary case may be commenced only under chapter 7 or chapter 11 of this title").

<sup>5</sup>For an excellent discussion of the legislative history and the constitutional issues raised by an involuntary chapter 13 filing, see Howard, *supra* note 3.

<sup>6</sup>11 U.S.C. § 1306(a)(2) (2012).

<sup>7</sup>Howard, *supra* note 3, at 193-94.

<sup>8</sup>See The Hon. Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 after BAPCPA*, 2007 U. ILL. L. REV. 67, 78 (2007) (explaining that even though § 1129(a)(15)(B)'s confirmation requirement is "based on chapter 13 practice, this confirmation requirement differs in several respects").

<sup>9</sup>See *supra* note 4.

<sup>10</sup>See 11 U.S.C. § 1112 (a)(2) (2012) (providing that a chapter 11 debtor may convert his case to chapter 7 so long as the case was not originally "commenced as an involuntary case under this chapter"). By comparison, a chapter 13 debtor has an absolute right to convert his case to chapter 7. See 11 U.S.C. § 1307(a) (stating that debtor "may convert a case under this chapter to a case under chapter 7 of this title at any time").

<sup>11</sup>See 11 U.S.C. § 1112 (b)(1) (2012) (stating that upon motion of a party in interest and absent unusual circumstances the bankruptcy court shall dismiss a case if the moving party establishes cause for dismissal).

<sup>12</sup>Howard, *supra* note 3, at 198-99 (discussing the Thirteenth Amendment concerns raised by BAPCPA's amendments to chapter 11).

cases filed against individual debtors are exceedingly rare. Of the 188 individual cases in the 2007 random sample, only 2 began with involuntary filings. Moreover, only 1 of those 2 cases, *In re Purselley*,<sup>13</sup> began with an involuntary chapter 11 filing.<sup>14</sup> The bankruptcy court entered an order for relief in *Purselley* about 8 months after the involuntary filing.<sup>15</sup> Neither the debtor nor any other party in interest filed a plan, and about a year after the order for relief the United States trustee moved to dismiss or convert the case, in part for failure to file a disclosure statement and plan of reorganization.<sup>16</sup> The bankruptcy court granted the United States trustee's motion and dismissed the case in November of 2009.

The data in my samples are limited to calendar years 2004 and 2007.<sup>17</sup> But, data on involuntary chapter 11 filings pre- and post-BAPCPA show that involuntary filings in chapter 11 are rare, indeed. For fiscal years 2009 through 2013, involuntary chapter 11 filings comprised less than 1% of all chapter 11 cases.<sup>18</sup> In fiscal year 2000 and 2005, the rate of involuntary chapter 11 filings exceeded 1%, but not by much: 1.1% in 2000 and 1.3% in 2005.<sup>19</sup> These figures include both individual and enterprise chapter 11 filings; thus, they overstate the applicable rate of involuntary filings against individual debtors in chapter 11. Thus, the data demonstrate that involuntary filings post-BAPCPA did not spike due to changes to chapter 11.

## B. CONVERTING TO CHAPTER 11

As the data in Table 1 demonstrate, a small but not insignificant percentage of debtors—about 14-16%—come to chapter 11 after having filed for

<sup>13</sup>No. 07-36293 (Bankr. D. Ariz. July 31, 2007).

<sup>14</sup>In *In re Kim*, No. 07-36293 (Bankr. N.D. Tex. Dec. 21, 2007), the debtor's creditors filed an involuntary petition under chapter 7. The bankruptcy court, after trial, entered an order for relief under chapter 7 on April 23, 2008. Order for Relief in an Involuntary Case, *In re Kim*, No. 07-36293 (Bankr. N.D. Tex. Apr. 23, 2008) (Docket No. 39). The debtor then moved to convert the case to chapter 11, and the bankruptcy court case granted the debtor's motion on May 9, 2008. *In re Kim*, No. 07-36293 (Bankr. N.D. Tex. May 9, 2008) (Docket No. 55).

<sup>15</sup>Order for Relief in Involuntary Chapter 11, *In re Purselley*, No. 07-36293 (Bankr. D. Ariz. March 18, 2008) (Docket No. 45).

<sup>16</sup>United States Trustee's Motion to Dismiss, or Convert to Chapter 7 ¶4, *In re Purselley*, No. 07-36293 (Bankr. D. Ariz. Feb. 23, 2009) (Docket No. 97) (stating that the debtor's case had been pending for more than a year and the only activity in the case were "numerous" unopposed lift-of-stay motions).

<sup>17</sup>None of the cases in the 2004 individual sample began with involuntary filings.

<sup>18</sup>See U.S. Bankruptcy Courts—Voluntary and Involuntary Cases Filed, by Chapter of the Bankruptcy Code, Table 7.2, available at <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=7.2&p=All&t=534&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=> (showing the following: (1) 114 involuntary filings of 14,631 cases in 2009 (.7%); (2) 119 involuntary cases of 14,072 chapter 11 cases in 2010 (.8%); (3) 113 involuntary cases of 11,866 chapter 11 cases in 2011 (.95%); (4) 53 involuntary cases of 10,544 in 2012 (.5%); and (5) 83 involuntary cases of 9,481 chapter 11 cases in 2013 (.88%).

<sup>19</sup>See *id.* (showing 107 involuntary cases of 9,728 in 2000 (1.1%) and 85 such cases of 6,552 in 2005 (1.3%).

relief initially under another chapter of the Bankruptcy Code. The difference between the 2004 and 2007 samples in the percentage of cases starting out in another chapter is not large—15.9% in 2004 and 13.8% in 2007. Moreover, while the change in percentage of debtors converting from chapter 7 to chapter 11 between 2004 and 2007 appears large—24% in 2004 but only 8% in 2007—it is important to recognize the small size of the converted-case sample. If two fewer cases had converted from chapter 7 in 2004 and two more in 2007, the percentage of cases converting from chapter 7 to 11 in 2004 and 2007 would be approximately the same—17% in 2004 and 15% in 2007.

**Table 1: Cases Converted to Chapter 11 from another Chapter of the Code**

Original Chapter	(A) 2004 (n = 182)			(B) 2007 (n = 188)		
	No.	Percent of Conversions	Percent of Total Sample	No.	Percent of Conversions	Percent of Total Sample
(1) Chapter 7	7	24.1%	3.8%	2 <sup>20</sup>	7.7%	1.1%
(2) Chapter 12	2	7%	1.1%	1	3.8%	<1%
(3) Chapter 13	20 <sup>21</sup>	69%	11%	23 <sup>22</sup>	88.5%	12.2%
Total	29	100%	15.9%	26	100%	13.8%

The data show that both pre- and post-BAPCPA most cases that converted to chapter 11 began in chapter 13. See Table 1, Row (3). If an individual files for relief under chapter 13 because he wants to reorganize his debts, why would he then convert to chapter 11? For the individual debtors in the 2007 sample, the reason was that the vast majority of these debtors did not qualify for relief under chapter 13.<sup>23</sup> Of the 22 cases in the 2007 individual sample that converted directly from chapter 13 to chapter 11, the

<sup>20</sup>One of these two cases was *In re Kim*, No. 07-36293 (Bankr. N.D. Tex. Dec. 21, 2007), which began as an involuntary chapter 7 case. See *supra* note 14.

<sup>21</sup>See *In re Francisco*, No. 04-12101 (Bankr. D. Ariz. July 12, 2004) (case began in chapter 7, debtor moved to convert to chapter 13, and then later moved to convert, again, this time to chapter 11).

<sup>22</sup>*In re Cruz*, No. 07-21695 (Bankr. E.D. Cal. March 31, 2007), began as a chapter 13 case, converted to chapter 7, and then converted to chapter 11.

<sup>23</sup>An individual debtor who filed for relief under chapter 13 between January 1, 2007, and ending March 31, 2007, had to have non-contingent, liquidated, unsecured debts less than \$307,675, and non-contingent, liquidated, secured debts less than \$922,975. See Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(b) of the Code, 72 Fed. Reg. 7082 (Feb. 14, 2007). The chapter 13 debt limits increased on April 1, 2007. Any individual debtor who filed for chapter 13 relief from April 1, 2007, through December 31, 2007, had to have non-contingent, liquidated, unsecured debts less than \$336,900, and non-contingent, liquidated, secured debts less than \$1,010,650 to qualify for chapter 13. See *id.* Exceeding either the secured or unsecured debt limit means that the individual debtor does not qualify for relief under chapter 13. See 11 U.S.C. § 109(e) (2012).

debtor exceeded the secured or unsecured debt limits in 19 cases.<sup>24</sup> In a few cases, the debtor or his attorney filed for relief under chapter 13 even though schedules filed with the petition showed non-contingent, liquidated liabilities clearly in excess of the chapter 13 debt limits.<sup>25</sup> In most cases, the debtor did not file schedules with the petition. Once the debtor did file schedules, his attorney then moved to convert the case to chapter 11,<sup>26</sup> often in response to a motion by the chapter 13 trustee to dismiss the case because the debtor was not eligible for relief under chapter 13.<sup>27</sup>

Starting in the "wrong" chapter increased the time spent in and the cost of bankruptcy for the debtor. The debtor who files for relief under chapter 13 only to convert to chapter 11 not only must find an attorney experienced

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<sup>24</sup>I do not include *In re Cruz* in this number. See *supra* note 22.

<sup>25</sup>See, e.g., *In re Dunnington*, No. 07-09652 (Bankr. S.D. Ind. Oct. 2, 2007) (Docket No. 1) (*pro se* debtors' schedules filed with petition showing non-contingent, liquidated unsecured liabilities well above \$336,900 unsecured debt limit for chapter 13 in effect at the time of filing); Motion to Convert Case from One Under Chapter 13 to a Case Under Chapter 11, *In re Lloyd*, No. 07-14134 (Bankr. D. Nev. Aug. 27, 2007) (Docket No. 17) (stating in motion to convert filed almost 7 weeks after filing of chapter 13 petition and schedules showing non-contingent, liquidated liabilities that were \$400,000 in excess of the chapter 13 secured debt limit that debtor's attorney had taken the case "upon short notice and overlooked that Debtor exceed[ed] the secured debt limitations and [was] not eligible for chapter 13 relief"); see also *In re Hall*, No. 07-00495 (Bankr. W.D. Mich. Jan. 26, 2007) (Docket No. 2) (married debtors' schedules filed 1 day after filing of petition showing non-contingent, liquidated unsecured liabilities well above \$307,675 unsecured debt limit then in effect for chapter 13).

<sup>26</sup>See, e.g., Motion for Conversion from Chapter 13 to Chapter 11 ¶3, *In re Kirila*, No. 07-11141 (Bankr. W.D. Pa. Sept. 25, 2007) (Docket No. 26) (stating in motion filed same day as amended Schedules E and F, which put married debtors' unsecured liabilities over chapter 13 unsecured debt limit that debtors "ha[d] now determined that their debts exceed[ed] the Chapter 13 debt limits"); Motion of Debtor For Conversion of Chapter 13 to Case under Chapter 11 ¶2, *In re Bradford*, No. 07-10199 (Bankr. E.D. Va. Feb. 20, 2007) (Docket No. 15) (stating in motion filed 1 day prior to filing of schedules and about 3 weeks after filing of petition that "[u]pon providing detailed information to counsel, [debtors'] counsel ha[d] determined that the amounts owed to secured creditors, and possibly unsecured creditors, depending on potential unliquidated and contingent liabilities, exceed[ed] the statutory limitations set out in 11 U.S.C. § 109(b)"); see also Motion to Convert to Chapter 11 ¶2, *In re Kyriacou*, No. 07-70530 (Bankr. E.D. Va. June 7, 2007) (Docket No. 23) (stating that at the § 341 meeting the "debtor's attorney [had] advised the Chapter 13 Trustee that since the filing of the petition the debtor [had] discovered two debts he [had] co-signed for a former business corporation he owned" and that the "newly discovered debts resulted in the debtor exceeding the allowable debt limit for a Chapter 13 case").

<sup>27</sup>See, e.g., Application to Convert to Chapter 11 ¶2, *In re Kobrin*, No. 07-05034 (Bankr. D. Conn. Jan. 16, 2008) (Docket No. 37) (motion to convert to chapter 11 filed more than 2 months after filing schedules showing unsecured liabilities in excess of unsecured debt limit and on same day as chapter 13 trustee moved to dismiss case because debtor was not eligible for chapter 13 relief); Motion to Convert Chapter 13 Case to Chapter 11, *In re Adams*, No. 07-14837 (Bankr. D. Md. Aug. 21, 2007) (Docket No. 41) (motion to convert to chapter 11 filed 6 weeks after filing schedules showing secured debt over chapter 13's limit and only after the chapter 13 trustee had filed motion to dismiss the case for exceeding the chapter 13 debt limits and the bankruptcy court had denied confirmation of debtor's chapter 13 plan); Notice of Conversion under 11 USC 706(a), *In re Walters*, 07-08310 (Bankr. N.D. Ill. May 21, 2007) (Docket No. 29) (motion filed to convert to chapter 11, although wrong Code section cited in motion, more than a month after filing schedules that exceeded both the secured and unsecured debt limits for chapter 13, and about a week after the chapter 13 trustee moved to dismiss the case on that basis).

in chapter 11 cases,<sup>28</sup> thereby delaying the start of the reorganization process, but also must pay for the work of two lawyers, not one. While it is not possible to determine the additional cost of the chapter 13 detour, it is possible to determine the time wasted in chapter 13 for these debtors. The time spent in chapter 13 prior to conversion ranged from a low of 47 days to a high of 196 days. Thus, about 10% of the individual debtors in the 2007 sample (19 of 188) spent on average an extra 115 days in bankruptcy before getting down to the business of crafting a chapter 11 plan of reorganization.<sup>29</sup>

### C. SMALL BUSINESS DEBTORS

With the passage of the Bankruptcy Code in 1978, Congress consolidated several of the Bankruptcy Act's reorganization chapters into a single business reorganization chapter—chapter 11. Concerns soon emerged, however, about the suitability of chapter 11 for small business debtors.<sup>30</sup> Congress responded at first by creating a small business election in the Bankruptcy Reform Act of 1994.<sup>31</sup> By electing small business status, a debtor could consolidate the disclosure statement and plan confirmation hearings, thereby saving time and money.<sup>32</sup> The National Bankruptcy Review Commission (the "Commission"), however, considered the small business election a failure.

The Commission recommends that choice of treatment as a "small business" debtor under the Bankruptcy Code should not be optional. . . . Otherwise, the separate track will not likely be used. . . . The unpopularity of the 1994 amendments to the Bankruptcy Code concerning "small business" debtors, which have been largely ignored, confirms this hypothesis.<sup>33</sup>

With the passage of BAPCPA, Congress adopted the Commission's recommendation and made small business treatment mandatory.<sup>34</sup>

What impact did the decision to make small business treatment

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<sup>28</sup>See, e.g., *Objection to Trustee's Motion to Dismiss* ¶¶1, 3, *In re Zicaro*, No. 07-43732 (D. Mass. Dec. 4, 2007) (Docket No. 39) (acknowledging that debtor's liabilities exceeded chapter 13 limits and noting that debtor "fully intend[ed] to convert" but requesting 30 days to find chapter 11 counsel).

<sup>29</sup>The median time was slightly lower at 100 days.

<sup>30</sup>See Anne Lawton, *An Argument for Simplifying the Code's "Small Business Debtor" Definition*, 21 AM. BANKR. INST. L. REV. 55, 60 (2013) [hereinafter *Simple Definition*].

<sup>31</sup>Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

<sup>32</sup>See Anne Lawton, *Chapter 11 Triage: Diagnosing a Debtor's Prospects for Success*, 54 ARIZ. L. REV. 985, 990 (2012).

<sup>33</sup>NAT'L BANKR. REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 634-35 (1997) [hereinafter *COMMISSION REPORT*].

<sup>34</sup>See *Simple Definition*, *supra* note 30, at 63 (explaining that, with the exception of the small business debtor definition, Congress adopted in largely unchanged form the Commission's small business recommendations).



mandatory have on individual chapter 11 debtors?<sup>35</sup> A substantial increase in the percentage of debtors checking the small business box on the petition would be expected for the individuals in the 2007 sample. The data in Tables 2 through 5, however, reveal that while the percentage of debtors identifying as small businesses increased in 2007 from 2004, the increase was quite small.

Table 2 simply shows the number of debtors in 2004 and 2007 who identified as small business debtors. The information in the table is taken from the last-filed petition in the chapter 11 case.<sup>36</sup> In 2004, there are 180, not 182, cases, because in two cases there was no access to relevant case documents on either PACER or Bloomberg Law.<sup>37</sup> For 2007, there are 186 cases, because petitioning creditors filed involuntary petitions in two cases in the sample.<sup>38</sup>

**Table 2: Debtor Status—Small Business Debtors**

	(A) 2004 (n = 180)		(B) 2007 (n = 186)	
	No.	Percent	No.	Percent
(1) Small Business	33	33/180 = 18.3%	41	41/186 = 22.0%
(2) Not Small Business	147	147/180 = 81.7%	145	145/186 = 78.0%

Table 2 counts as a small business debtor only those debtors who affirmatively checked the small business debtor box in 2007. For 2004, small business status was elective. The petition had the following two check boxes: (1) Debtor is a small business as defined in 11 U.S.C. § 101; and (2) Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional). I coded the debtor as a small business if the debtor checked either or both of these two petition boxes.

In 2004 and 2007, debtors in chapters 7, 12, and 13 were not required to identify as small or non-small business debtors. In 2004, the small business election appeared in a box labeled “Chapter 11 Small Business.” In 2007, the small and non-small business boxes appear in a section labeled “Chapter 11 Debtors.” Therefore, unless the debtor filed an amended petition upon con-

<sup>35</sup>The Code’s small business definition includes individual debtors, because the definition applies to “any person engaged in commercial or business activities.” 11 U.S.C. § 101(51D)(A) (2012).

<sup>36</sup>While the petition provided small business treatment information in the vast majority of cases, in a few cases that converted from another chapter of the Code to chapter 11, the debtor did not file a new petition in chapter 11. Nonetheless, the debtor indicated its status as a small or non-small business in some other filing in the case. See, e.g., Motion to Convert to Chapter 11 ¶4, *In re Quillian*, No. 07-20199 (Bankr. S.D. Tex. Oct. 26, 2007) (Docket No. 74) (requesting that debtor “be treated as a small business”).

<sup>37</sup>The two cases are *In re Sprinkle*, No. 04-01592 (Bankr. W.D. Va. April 9, 2004) and *In re Pena & Huynh*, No. 04-55953 (Bankr. N.D. Cal. Sept. 23, 2004).

<sup>38</sup>See *In re Kim*, No. 07-36293 (Bankr. N.D. Tex. Dec. 21, 2007); *In re Purselley*, No. 07-3678 (Bankr. D. Ariz. July 31, 2007).

version to chapter 11, the petition filed in chapter 7, 12, or 13 did not provide information on the debtor's small business status. In fact, for both the 2004 and 2007 samples, most individual debtors did not file an amended petition upon conversion. For 2004, that was less an issue because small business status was elective. Nonetheless, of the 29 debtors converting into chapter 11 in 2004, only 6 filed amended petitions upon conversion<sup>39</sup> or otherwise elected small business treatment.<sup>40</sup> In 2007, when small business treatment was mandatory, only 1 of the 26 debtors whose cases were converted to chapter 11 filed an amended petition indicating small or non-small business status.<sup>41</sup> One other debtor requested treatment as a small business debtor in his motion seeking conversion from chapter 12 to chapter 11.<sup>42</sup>

Table 2 identified any debtor who failed to check a small business box as a non-small business. Table 3 refines the data in Table 2 by eliminating from each year's sample any debtor who began bankruptcy under another chapter of the Code *unless* the debtor checked that it was a small business debtor on its original petition, filed an amended petition upon conversion to chapter 11, or otherwise elected small business treatment. Thus, the number of non-small business debtors drops for both 2004 and 2007, although the proportion of small business debtors changes only slightly in both years.

**Table 3: Debtor Status—Small Business Debtors Adjusted for “Converted To” Cases**

	(A) 2004 (n = 157)		(B) 2007 (n = 163)	
	No.	Percent	No.	Percent
(1) Small Business	33	33/157 = 21.0%	41	41/163 = 25.2%
(2) Not Small Business	124	124/157 = 79.0%	122	122/163 = 74.8%

<sup>39</sup>*In re Payne*, No. 04-57069 (Bankr. W.D. Tex. Dec. 15, 2004) (not checking either small business box on amended petition filed post-conversion to chapter 11); *In re DeFilippis*, No. 04-14833 (M.D. Tenn. Dec. 10, 2004) (not checking either small business box on amended petition filed upon conversion to chapter 11 from chapter 13); *In re Kim*, No. 04-13607 (Bankr. C.D. Cal. Feb. 19, 2004) (checking small business on amended petition filed after conversion to chapter 11). *But see In re Grady*, No. 04-14883 (Bankr. E.D. Ark. April 22, 2004) (checking that debtor was a small business on its chapter 13 petition).

<sup>40</sup>See Order Granting Debtor's Request That a Committee of Creditors Not be Appointed, *In re Teston*, No. 04-53936 (Bankr. M.D. Ga. Nov. 29, 2004) (Docket No. 19) (order stating that debtor had elected small business treatment and should be treated as such, and granting debtor request not to appoint an official committee of unsecured creditors); Debtors' Election for Treatment as a Small Business Reorganization Case, *In re Spierenburg*, No. 04-03216 (Bankr. S.D. Iowa Oct. 28, 2004) (Docket No. 28) (electing small business status after converting to chapter 11 from chapter 13).

<sup>41</sup>See Schedules, *In re Heath*, No. 07-34933 (Bankr. S.D. Tex. Dec. 10, 2007) (Docket No. 53) (amended petition filed upon conversion to chapter 11 showing debtor checked box stating he was not a small business debtor).

<sup>42</sup>See Motion to Convert to Chapter 11 ¶4, *In re Quillian*, No. 07-20199 (Bankr. S.D. Tex. Oct. 26, 2007) (Docket No. 74) (requesting that debtor “be treated as a small business”).

Table 3 shows a higher proportion of small business debtors than does Table 2. Compare Columns (A) and (B), Row (1), Tables 2 and 3. The reason is that eliminating the “converted to” cases reduced the sample size in both years. What is interesting, however, is that even with a smaller group of debtors, there still is not a big difference in the percentage of small business cases in 2007 when compared with 2004. The absolute number of debtors checking the petition box identifying as non-small businesses stayed almost the same—124 in 2004 and 122 in 2007. See Table 3, Row (2).

**Table 4: Small Business Debtors—Individual Consumer vs. Business**

	(A) 2004		(B) 2007	
	No.	Percent	No.	Percent
(1) Small Business	33	33/180 = 18.3%	41	41/186 = 22.0%
Consumer	9	9/33 = 27.3%	9	9/41 = 22.0%
Business	24	24/33 = 72.7%	32	32/41 = 78.0%
(2) Not Small Business	147	147/180 = 81.7%	145	145/186 = 78.0%
Consumer	97	97/147 = 66.0%	74	74/145 = 51.0%
Business	50	50/147 = 34.0%	71	71/145 = 49.0%

Tables 4 and 5 combine the debtor’s small business status with the debtor’s identification on the petition as an individual consumer versus an individual business filer. Again, the two tables present the data counting converted cases (in Table 4) and eliminating any converted case (in Table 5) for which the debtor did not file an amended petition upon conversion to chapter 11 or otherwise elect small business treatment.

**Table 5: Small Business Debtors—Individual Consumer vs. Business Adjusted for “Converted To” Cases**

	(A) 2004		(B) 2007	
	No.	Percent	No.	Percent
(1) Small Business	33	33/157 = 21.0%	41	41/163 = 25.2%
Consumer	9	9/33 = 27.3%	9	9/41 = 22.0%
Business	24	24/33 = 72.7%	32	32/41 = 78.0%
(2) Not Small Business	124	124/157 = 79.0%	122	122/163 = 74.8%
Consumer	77	77/124 = 62.1%	55	55/122 = 45.1%
Business	47	47/124 = 37.9%	67	67/122 = 54.9%

Finally, in Table 6, I narrowed the sample to include *only* those debtors who checked the box on the petition stating that their liabilities were primarily business in nature. As the data in Table 6 reveal, approximately two-

thirds of these debtors, in both 2004 and 2007, did not identify as small business debtors. See Table 6, Row (2).

**Table 6: Business Debtors Identifying as Small Businesses Adjusted for “Converted To” Cases**

	(A) 2004 (n = 71)		(B) 2007 (n = 99)	
	No.	Percent	No.	Percent
(1) Small Business	24	24/71 = 33.8%	32	32/99 = 32.3%
(2) Not Small Business	47	47/71 = 66.2%	67	67/99 = 67.7%

The data in Tables 2 through 6 raise at least two issues requiring further investigation. A comparison of the *n* in Tables 2 and 3, and Tables 4 and 5 shows that in 23 cases in both 2004 and 2007 the debtor did not refile his petition or otherwise indicate small business status upon conversion to chapter 11. Therefore, about 12% of the individual cases in the 2004 and 2007 samples failed to identify as small versus non-small business debtors. The failure to designate small or non-small business status was unimportant in 2004. But, Congress made small business status mandatory in order to identify early in the chapter 11 case those debtors with weak prospects for reorganization.<sup>43</sup> It makes little sense to allow debtors to avoid small business treatment simply because they file for relief initially under a chapter of the Code other than chapter 11. Thus, one issue for further study is whether courts have closed this “loophole” since 2007.

Second, as the data in Table 6 show, even after eliminating converted cases without clear indicia of small or non-small business status, approximately two-thirds of the debtors who said that their debts were primarily business in nature did not identify as small business debtors. While the change is small, the percentage of debtors with primarily business debts who identified as small business debtors dropped between 2004 and 2007. Compare Column (A), Row (1) with Column (B), Row (1) of Table 6.

Now, of course, there are other requirements for small business status besides being engaged in commercial or business activities. The “real property” exclusion may account for this phenomenon, at least in part. But, in 2007, median *total* liabilities, which overstate liabilities for purposes of the small business definition because contingent and unliquidated debts are not subtracted off, were only \$1.6M, which was about \$589K below the \$2.19M liability figure in effect for three-quarters of 2007.<sup>44</sup> In addition, about 65% of the individual debtors in the 2007 sample had liabilities of \$2.19M or less.

<sup>43</sup>See *Simple Definition*, *supra* note 30, at 62.

<sup>44</sup>On April 1, 2007, the dollar figure in the Code’s small business debtor definition increased from \$2M to \$2.19M, as required by 11 U.S.C. § 104(a) (2012).

Are debtors deliberately checking the non-small business box on the petition even when they qualify as small business debtors in order to avoid the consequences of doing so—the “drop dead” dates for plan proposal and confirmation and the added filing requirements under § 1116? Is the small business debtor definition so convoluted that the default mode for chapter 11 debtors and their attorneys is to check the non-small business box on the petition?

What is clear is that even though Congress made small business status mandatory with the passage of BAPCPA, doing so had very little impact on the percentage of individual debtors identifying as small business debtors. At least for the individual debtors in the 2007 sample, few consequences attached to the failure to identify as a small business debtor. While the United States trustee or any party in interest may object to the debtor’s designation on the petition, few such objections were filed.<sup>45</sup> What remains for further study is the long-term impact—beyond 2007—of Congress’s decision to make small business status mandatory. If small business debtors can easily avoid the Code’s requirements for small business status by simply checking the non-small business box on the petition, then small business status becomes *de facto* elective.

#### D. CASE DISPOSITION AND TIME TO DISPOSITION

##### 1. *Case Disposition*

Table 7 provides data on the disposition of the individual cases in the 2004 and 2007 samples. The data is about only the chapter 11 leg of the case. If a chapter 11 case converted to chapter 7, I coded the case as a conversion to chapter 7 even if the bankruptcy court ultimately dismissed the chapter 7 case. The table also only provides information about the *initial* chapter 11 case disposition. For example, if the bankruptcy court confirmed a plan in the chapter 11 case but the debtor failed to successfully perform that plan and the case later converted to chapter 7, I coded the case as a confirmation.

In 4 cases—3 in 2004 and 1 in 2007—the bankruptcy court vacated its initial conversion or dismissal order and, therefore, the initial disposition differed from the final case disposition.<sup>46</sup> In none of these three cases, however,

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<sup>45</sup>FED. R. BANKR. P. 1020(b) (stating that the United States trustee or any party in interest may object to the debtor’s designation as a small or non-small-business on the petition so long as the objection is filed within 30 days of the conclusion of the § 341 meeting).

<sup>46</sup>See *In re Perez*, No. 07-07532 (Bankr. D. P.R. Dec. 21, 2007) (case converted to chapter 7, debtor moved for reconsideration of conversion to chapter 7, asking the court to either reconvert the case to chapter 11 or dismiss it, and the court ordered dismissal with a 180-day bar to refiling); *In re Garcia*, No. 04-12461 (Bankr. D. P.R. Dec. 9, 2004) (chapter 11 case dismissed, dismissal vacated, and case later converted to chapter 7); *In re King*, No. 04-22901 (Bankr. D. Md. May 25, 2004) (petition filed in chapter 13, case converted to chapter 11 and then to chapter 7, order of conversion to chapter 7 vacated and case reconverted to chapter 11 with chapter 11 case later being dismissed); *In re Mosley*, No. 04-32080 (Bankr.

did the debtor confirm a plan. I counted the initial disposition for purposes of the data in Table 7.

**Table 7: Initial Disposition in Chapter 11**

	(A) 2004 (n = 182)		(B) 2007 (n = 188)	
	Number of Cases	Percentage of Individual Sample	Number of Cases	Percentage of Individual Sample
(1) Confirmed	53	53/182 = 29.1%	48	48/188 = 25.5%
(2) Converted	53	53/182 = 29.1%	69	69/188 = 36.7%
(3) Dismissed	76	76/182 = 41.8%	71	71/188 = 37.8%

As the data in Table 7 show, dismissal is the most common disposition in chapter 11. In 2004, the bankruptcy courts dismissed more than 4 of every 10 chapter 11 cases. See Table 7, Column (A), Row (3). The dismissal rate dropped slightly in 2007 with a more even split between converted and dismissed cases. See Table 7, Column (B), Row (3). But, in both 2004 and 2007, less than 3 in 10 cases resulted in a confirmed plan. Compare Column (A), Row (1) with Column (B), Row (1) of Table 7. The difference in plan confirmation rates between 2004 and 2007 is not statistically significant ( $p > 0.05$ ).

A slightly higher percentage of debtors proposed plans in 2007 compared with 2004, but, as Table 8 shows, a smaller percentage of those debtors confirmed plans in 2007 compared with 2004. Compare Column (B), Rows (1) & (2) of Table 8.

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S.D. Fla. April 30, 2004) (petition filed in chapter 7, case then converted to chapter 11, chapter 11 case dismissed but dismissal order vacated, chapter 11 case later converted to chapter 13, chapter 13 case dismissed and dismissal order later vacated with case terminating in chapter 13 with a confirmed chapter 13 plan). In two other cases filed in 2007, the court granted a motion to vacate or reconsider the court's initial order of dismissal but upon vacating the original order the court once again entered an order of dismissal in the case. See *In re Pearson*, No. 07-12234 (Bankr. W.D. Tex. Dec. 3, 2007) (bankruptcy court vacated initial dismissal upon debtor's motion which apprised court that debtor's attorney had died prior to response time on dismissal motion, and court subsequently entered agreed order of dismissal between debtor and creditor moving for dismissal); *In re Allums*, No. 07-40122 (Bankr. N.D. Cal. Jan. 12, 2007) (court vacated initial dismissal granted for lack of prosecution, vacated that order, and subsequently entered an order dismissing with prejudice for lack of prosecution).

Table 8: Plan Proposal and Plan Confirmation

	(A) Plan Proposal		(B) Plan Confirmation	
	No.	Percentage of Sample Proposing a Plan	No.	Percentage Confirming of Proposed-Plan Cases
(1) 2004	82	82/182 = 45.1%	53	53/82 = 64.6%
(2) 2007	93	93/188 = 49.5%	48	48/93 = 51.6%

The plan-confirmation findings are not surprising. The plan-confirmation rate for individual debtors is not markedly different from the 30.3% and 33.4% plan-confirmation rates found by Professors Warren and Westbrook in their study of chapter 11 debtors from 1994 and 2002, respectively.<sup>47</sup>

What is interesting is the change between 2004 and 2007 in the proportion of small business debtors who proposed plans. As Table 9 shows, in 2004, in only 9 of the 82 cases in which debtors proposed plans did the debtor check one or both of the small business debtor boxes on the voluntary petition. By comparison, 20 of the 93 debtors who proposed plans in 2007 checked the box on the petition identifying as a small business debtor.

Table 9: Plan Proposal by Small Business Status

	(A) Small Business Debtors		(B) Plan Proposal	
	No.	Percentage of Sample	No.	Percentage Proposing Plan
(1) 2004 ( <i>n</i> = 180)	33	33/180 = 18.3%	9	9/81 = 11.1% <sup>48</sup>
(2) 2007 ( <i>n</i> = 186)	41	41/186 = 22.0%	20	20/92 = 21.7% <sup>49</sup>

In 2004, small business debtors comprised about 18% of the individual cases in the sample, yet only 11.1% of those debtors proposed plans. See Table 9, Columns (A) & (B), Row (1). By comparison, in 2007, 21.7% of the cases with proposed plans were small business cases and small business debtors comprised about 22% of the individual debtors in the 2007 sample. See Table 9, Columns (A) & (B), Row (2). In other words, post-BAPCPA, small business debtors proposed plans in proportion to their representation among individual debtors in the 2007 sample while pre-BAPCPA they did not do so.

<sup>47</sup>See Elizabeth Warren & Jay Allen Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 615 (2009).

<sup>48</sup>The denominator is 81, not 82, because one of the proposed-plan cases—*In re Sprinkle*—is not included in the small business total for Table 2. See *supra* note 37.

<sup>49</sup>The denominator is 92, not 93, because one of the proposed-plan cases—*In re Kim*—is not included in the small business total for Table 2. See *supra* note 38.

A few words of caution are in order, however. The percentage figures in Column (B) of Table 9 are based on a very small number of debtors—9 in 2004 and 20 in 2007. In addition, small business status depends on debtors correctly identifying themselves on the petition. While BAPCPA made such identification mandatory, few negative consequences attached, at least in 2007, to a debtor's failure to check the small business debtor box on the petition. Moreover, pre-BAPCPA, small business status was elective. In other words, the figures presented earlier in Table 2 may understate, for different reasons, the actual number of small business debtors among the individuals in the 2004 and 2007 samples. Thus, there are problems in comparing changes in plan-proposal rates for small business debtors pre- and post-BAPCPA.

## 2. *Time to Disposition*

With BAPCPA, Congress created plan-proposal and plan-confirmation time frames applicable only to small business debtors. The small business debtor has a 180-day exclusivity period compared with the 120-day period for non-small business debtors.<sup>50</sup> The longer exclusivity period, however, is the only time provision in BAPCPA that favors small business debtors.

The Code provides that in a small business case, "the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief."<sup>51</sup> The Code also provides that in a small business case the bankruptcy court must confirm the plan "no later than 45 days after the plan is filed."<sup>52</sup> Neither the 300-day plan-proposal nor the 45-day plan-confirmation time frame applies to a non-small business debtor.

The bankruptcy court may extend the 300-day and/or the 45-day periods, but the extension order must be signed prior to the expiration of the relevant time frame.<sup>53</sup> The debtor also must demonstrate by a preponderance of the evidence that "it is more likely than not that the court will confirm a plan within a reasonable time frame."<sup>54</sup>

Why did Congress create the 300-day plan proposal and 45-day plan-confirmation time frames in BAPCPA? The legislative history provides little guidance. But, the House Report accompanying BAPCPA states that the bill "includes provisions with respect to small business . . . debtors largely derived from recommendations of the National Bankruptcy Review Commission".<sup>55</sup> Thus, judges and commentators often turn to the Commission's report for guidance.

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<sup>50</sup>Compare 11 U.S.C. § 1121(b) (2012) (120 days) with 11 U.S.C. § 1121(e)(1) (2012) (180 days).

<sup>51</sup>11 U.S.C. § 1121(e)(2) (2012).

<sup>52</sup>11 U.S.C. § 1129(e) (2012).

<sup>53</sup>11 U.S.C. § 1121(e)(3)(C) (2012).

<sup>54</sup>11 U.S.C. § 1121(e)(3)(A) (2012).

<sup>55</sup>H. REP. NO. 109-31, Part 1, at 19 (2005).



The National Bankruptcy Review Commission ("Commission") identified two types of chapter 11 debtors: (1) "the relatively small proportion" of debtors with a reasonable chance of reorganizing and (2) the "much larger proportion of cases in which the debtor has no reasonable prospect of rehabilitation."<sup>56</sup> In reaction to studies that chapter 11 debtors "often live under the protection of the Bankruptcy Code for literally years, often without providing any meaningful return to unsecured creditors,"<sup>57</sup> the Commission recommended an outside time limit for plan confirmation of 150 days from the order for relief and a 90-day plan-proposal period.<sup>58</sup>

Congress did not adopt the Commission's suggested time frames. Instead, Congress significantly lengthened the plan-proposal period—from 90 to 300 days—while effectively shortening the time to confirmation from plan proposal – from 60 to 45 days. Nonetheless, Congress's imposition of plan-proposal and plan-confirmation time frames attests to the impact of the Commission's articulated concern about debtors languishing in chapter 11.

As the data in Table 3 show, only a quarter of the individual debtors in the 2007 sample identified as small business debtors. The increase in small-business identification between 2004 and 2007 is small. Nonetheless, no plan-proposal or plan-confirmation deadlines existed pre-BAPCPA. If a quarter of the debtors in the post-BAPCPA sample had to adhere to deadlines for plan proposal and plan confirmation, did those deadlines have any impact on the time to disposition for the 2007 sample?

Table 10 provides data on the time to first-plan proposal from the start of the chapter 11 case. Because a debtor who files a chapter 7, 12, or 13 case will not propose a chapter 11 plan until the case converts to chapter 11, the time periods in the table reflect the time to first-plan proposal from the start of the chapter 11 case, not the filing of the voluntary petition under another chapter of the Code. In addition, while there is only one chapter 11 involuntary case (in the 2007 sample), I counted the time to first plan proposal from the order for relief, not from the original filing of the involuntary chapter 11 petition.

Table 10 includes cases in which the debtor proposed a plan initially and also cases in which the court dismissed the case, the debtor moved to re-open or to vacate the court's order, the court granted the debtor's motion, and the debtor then proposed a plan in the "re-opened" case. In only 5 of the 370 individual cases—4 in 2004,<sup>59</sup> and 1 in 2007<sup>60</sup>—did the debtor propose a

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<sup>56</sup>See COMMISSION REPORT, *supra* note 33, at 609.

<sup>57</sup>*Id.* at 613.

<sup>58</sup>See *id.* at 621 § 2.5.5.

<sup>59</sup>See *In re Garcia*, No. 04-12461 (Bankr. D. P.R. Dec. 9, 2004) (debtor proposed first plan on day of dismissal order); *In re McDowell*, No. 04-18329 (Bankr. D. Ariz. Oct. 19, 2004) (case dismissed after 21 days, reinstated next day, dismissed again and reinstated about 2 months later with debtor proposing a

plan during the “re-opened” case. In neither 2004 nor 2007 did the bankruptcy court confirm plans in these “re-opened” cases.

Finally, before moving on to the results, a note is in order about counting time. The results in Table 10 show a large difference, especially in 2004, between the average and the median times from start of the chapter 11 case to first-plan proposal. Compare Column (A), Rows (1) & (2). The median figure is a better metric, because outliers pull averages up or down. For example, there are several cases in the 2004 sample with 3 or 4 years between the petition date and the date of first-plan proposal. In fact, the debtor in *In re LaVigne* first proposed a plan more than 9 years after the chapter 11 petition date.<sup>61</sup> By comparison, there are fewer extreme outliers in 2007 and, thus, the average time is smaller.

Table 10: Time to Plan Proposal from Start of Chapter 11 Case

	(A) 2004 (n = 82)	(B) 2007 (n = 93)
(1) Average Time to First Plan	324.1 days	267.1 days
(2) Median Time to First Plan	197.5 days	217.0 days
(3) Percentage filed w/in 300 days	57/82 = 69.5%	71/93 = 76.3%

What is interesting about the data in Table 10 is that the median time to plan proposal increased by 20 days from 2004 to 2007. This result seems odd, given BAPCPA’s new requirement that small business debtors propose a plan within 300 days of the start of the chapter 11 case.

Notwithstanding this increase in median time to plan proposal, almost 70% of the debtors (69.5%, or 57 of 82 debtors) in 2004 and 76% of the debtors in 2007 (76.3%, or 71 of 93 debtors) who proposed plans did so within 300 days of the chapter 11 petition date. Thus, even before BAPCPA, about 7 in 10 debtors who proposed plans did so within the 300-day time frame later established by the amendments to § 1121(e) of the Code.

Table 11 provides data on plan confirmation; it does not take account of plan failure. Thus, the data in Table 11 cover cases in which the bankruptcy court confirmed a plan, even if the debtor subsequently failed to successfully perform that plan.

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plan about 5 months later); *In re Tufail*, No. 04-17042 (Bankr. E.D. La. Sept. 17, 2004) (debtor filed plan about 3 months after dismissal vacated and case reinstated); *In re King*, No. 04-22901 (Bankr. D. Md. May 25, 2004) (debtor proposed plan about 2 months after entry of joint consent order and stipulation vacating conversion to chapter 7 and reconverting case to chapter 11).

<sup>60</sup>See *In re Overstreet*, No. 07-30890 (Bankr. W.D. Tenn. Nov. 2, 2007) (debtor filed plan about 3 months after case reopening).

<sup>61</sup>*In re LaVigne*, No. 04-64078 (Bankr. N.D.N.Y. June 4, 2004).

Table 11: Time from 1st Plan to Plan Confirmation

	(A) 2004 (n = 53)	(B) 2007 (n = 48)
(1) Confirmed Percentage of Individual Sample	53/182 = 29.1%	48/188 = 25.5%
(2) Confirmed Percentage of Proposed-Plan Cases	53/82 = 64.6%	48/93 = 51.6%
(3) Average Time	263.8 days	193.3 days
(4) Median Time	183 days	132 days

If plan confirmation is the measure of success, then less than 3 in 10 individual chapter 11 cases qualify as a success. As Table 11 shows, the rate of plan confirmation fell slightly in 2007 to 25.5% from 29.1% in 2004. Compare Column (B), Row (1) with Column (A), Row (1). But, what is interesting is that among the group of debtors who proposed plans, the rate of plan confirmation fell dramatically from about 65% in 2004 down to approximately 52% in 2007. Compare Column (A), Row (2) with Column (B), Row (2).

How long did it take debtors to move from first plan to plan confirmation? Half the cases in 2004 moved from first-plan proposal to plan confirmation in 183 days or less, or about 6 months or less. See Table 11, Column (A), Row (4). In 2007, that time period dropped by 51 days to 132 days. See Table 11, Column (B), Row (4). Thus, cases moved more quickly to confirmation in 2007 than in 2004, with half the cases in the 2007 individual sample moving from first-plan proposal to confirmation in 4.5 months or less.

One final note is in order about the data in Table 11. In 2005, Congress added a requirement that in small business cases the "court shall confirm a plan . . . not later than 45 days after the plan is filed."<sup>62</sup> The statutory language is unclear as to what happens in the case of plan amendments. Does the 45-day clock reset? If not, then Congress created a deadline that virtually no individual debtor can satisfy. In 2004, only 1 of the 53 cases with confirmed plans achieved confirmation within 45 days of first-plan proposal.<sup>63</sup> That figure changed little in 2007; only 3 of the 48 cases in the 2007 sample reached confirmation within 45 days of first-plan proposal.<sup>64</sup>

Given that the time from first-plan proposal to confirmation dropped, it is not surprising that the time from the start of the chapter 11 case to confirmation also dropped from 2004 to 2007. As Table 12 shows, in 2004, the median time to plan confirmation from the start of the chapter 11 case was 506

<sup>62</sup>11 U.S.C. § 1129(e) (2012).

<sup>63</sup>*In re Parker*, No. 04-24109 (Bankr. D. Kan. Sept. 27, 2004).

<sup>64</sup>See *In re Kaib*, No. 07-27770 (Bankr. W.D. Pa. Dec. 10, 2007); *In re Diaz*, No. 07-38226 (Bankr. S.D. Tex. Dec. 1, 2007); *In re Rogers*, No. 07-10279 (Bankr. D. Md. Jan. 9, 2007).

days or almost 17 months. See Column (A), Row (1). The median time to plan confirmation dropped dramatically in 2007 to 355 days, or just shy of a year. See Column (B), Row (1). In fact, the bankruptcy court confirmed a plan within 1 year of the start of the chapter 11 case in 52% of the individual debtor cases in the 2007 sample. By comparison, only about a third of the individual cases in the 2004 sample reached confirmation within a year of the start of the chapter 11 case. Moreover, the *average* time from start of the chapter 11 case to confirmation was about 1.5 months shorter in 2007 than the *median* time in 2004. Compare Column (B), Row (1) with Column (A), Row (1) of Table 12.

**Table 12: Time to Disposition from Start of Chapter 11 Case**

	(A) 2004 (n = 182)		(B) 2007 (n = 188)	
	Average Time to disposition	Median Time to disposition	Average Time to disposition	Median Time to disposition
(1) Confirmed plan	633.6 days	506 days	457.6 days	355 days
(2) No confirmed plan	314.9 days	228 days	335.2 days	284 days

Was there a similar decrease in the time to disposition for cases without confirmed plans in 2007? No, and, in fact, the median time to disposition for cases without confirmed plans increased by 56 days, or almost two months, from 2004 to 2007.

In 2004, the bankruptcy court either dismissed or converted half the cases in which the debtor did *not* confirm a plan in 228 days or less, or a little less than 8 months from the start of the chapter 11 case. See Table 12, Column (A), Row (2). But, in 2007, the time to disposition for cases without a confirmed plan *increased* by almost two months to 284 days. See Table 12, Column (B), Row (2). Moreover, the percentage of cases reaching disposition within a year from the start of the chapter 11 case dropped in 2007 to approximately 68% from 74% in 2004.

The data present a baffling picture. While bankruptcy courts confirmed few plans within 45 days of first-plan proposal,<sup>65</sup> the time from first-plan proposal to plan confirmation dropped by 51 days from 2004 to 2007. In addition, the time from the start of the chapter 11 case to plan confirmation declined sharply from about 17 months in 2004 to just under 1 year's time in 2007. At the same time, however, it took longer in 2007 than in 2004 to get to first-plan proposal even though Congress amended the Code to require small business debtors to propose a plan within 300 days of the start of the

<sup>65</sup>See *supra* notes 62-64 and accompanying text; see also 11 U.S.C. § 1129(e) (2012).

chapter 11 case.<sup>66</sup> Moreover, while the time to confirmation from the start of the chapter 11 case dropped, the time to conversion or dismissal for cases without a confirmed plan increased by almost two months from 2004 to 2007.

What accounts for this odd combination of findings? With BAPCPA, Congress sent a message: too many debtors languish in chapter 11 with little chance for reorganization. For the players in the bankruptcy system, BAPCPA's reforms, albeit limited to small business debtors, signaled the need to move all cases more quickly toward reorganization. In fact, that is what the data show happened for confirmed-plan cases. The median time to plan confirmation dropped from about 17 months in 2004 to just under a year in 2007.

Why, then, would the time to plan proposal and disposition for cases without confirmed plans be longer in 2007 than in 2004? One possible explanation is that while Congress intended the 300-day deadline for plan proposal to apply only to small business debtors, the deadline became a *de facto* extension of the time allowed for plan proposal in all chapter 11 cases. What was intended as a deadline to move so-called "dead-on-arrival" small business cases out of chapter 11 more expeditiously became the metric against which motions for dismissal or conversion were measured for all cases in which the debtor had not yet proposed a plan. As a result, the time to first-plan proposal increased in 2007 from 2004, and it took longer in 2007 for bankruptcy courts to convert or dismiss cases in which no plan had been proposed.

## CONCLUSION

While there is little data on individual chapter 11 debtors, the existing data show that they fare poorly in chapter 11 with fewer than 3 in 10 even getting to plan confirmation. With BAPCPA, Congress introduced various reforms, but the data present a mixed picture about the impact of some of these reforms. The time to plan confirmation dropped dramatically. Yet, at the same time the time to first-plan proposal and the time to conversion or dismissal for cases without a confirmed plan increased. While Congress made small business status mandatory with BAPCPA, the 2007 data suggest that small business debtors may be avoiding the additional disclosure requirements of § 1116 and the plan-proposal and plan-confirmation deadlines of §§ 1121(e) and 1129(e) by not checking the small business debtor box on the petition. In addition, because the vast majority of the debtors in the 2004 and 2007 samples did not file amended petitions upon conversion from chapter 7, 12, or 13 to chapter 11, the debtors in these "converted-to-11" cases avoided small business status altogether.

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<sup>66</sup>See 11 U.S.C. § 1121(e)(3) (2012).

The findings in this Article raise several questions requiring further investigation. First, is it really the case that making small business status mandatory had almost no effect on the proportion of small business debtors? The data raise at least two avenues to explore. Are debtors who file for relief under chapter 7, 12, or 13 and then convert to chapter 11 still not filing amended petitions designating their status as a small or non-small business? If so, this loophole allows some small business debtors to slip through the cracks. Moreover, the problem is exacerbated by the fact that at least in 2007 the players in the system largely left unchallenged the debtor's designation on the petition as a non-small business. If small business debtors do not identify as small businesses, then it makes it difficult to assess the impact of BAPCPA's small business reforms.

Second, did the time to plan confirmation remain at 2007 levels, drop even further, or go back up to pre-BAPCPA time frames? Longitudinal studies of individual debtors are needed to determine whether BAPCPA's reforms did, in fact, bring down the time that debtors spend in chapter 11 prior to plan confirmation.<sup>67</sup> Third, were the findings from 2007 regarding plan proposal and time to disposition for cases without a confirmed plan a random variation? Or, did this odd pattern of decreasing time to confirmation but increasing time to conversion or dismissal persist?

Finally, in an earlier study of the same cohort of individual debtors, I found that there was a statistically significant difference in plan-performance rates between the individual debtors in the 2004 and 2007 samples.<sup>68</sup> In that earlier piece, I suggested that the Great Recession might explain the significant decrease in successful plan performance in 2007. "Unlike their counterparts from 2004, the individuals in the 2007 sample confronted a collapsing real estate market and sharp declines in consumer spending."<sup>69</sup>

Another possible explanation for the increased failure rate, however, is the sharp drop in time to confirmation. Do shortened time periods for plan confirmation bring with them confirmation of plans that are not yet ready for prime time? In other words, can the system move too fast, thereby shortening the time needed to carefully vet the feasibility of plans proposed for confirmation?

These and other questions must await further study.

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<sup>67</sup>The American Bankruptcy Institute's Anthony H.N. Schnelling Endowment Fund recently funded a large-scale study of individual chapter 11 debtors. Data for the study is drawn from chapter 11 cases filed in 2010 and 2013. Professor Margaret Howard is the study's Reporter, Professor Richard Hynes is the lead investigator and I am the associate investigator for the study.

<sup>68</sup>See *Individual Debtors*, *supra* note 1, at 485-86.

<sup>69</sup>*Id.* at 486.

